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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. [redacted] 87

MRS. R. L. CLARK, As Legal Guardian For
SHIRLEY TUCKER

Petitioner,

versus

GREAT AMERICAN INSURANCE COMPANY OF
NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

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May 9, 1968.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Mrs. R. L. Clark, as Legal Guardian for Shirley Tucker, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in above entitled case on December 19, 1967 in which a petition for rehearing was denied on the 18th day of February, 1968.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is unreported, and is printed in Appendix A hereto, infra page 4 . The judgment of the Circuit Court of Appeals is printed in Appendix A hereto, infra, page 2 . The order of the Circuit Court of Appeals for the Fifth Circuit denying the petition for rehearing is printed in Appendix A hereto, infra, page 1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 19, 1967, (infra, Appendix A, page 2). Rehearing was denied on February 13, 1968 (infra, Appendix A, page 1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

(1) Can the Fifth Circuit Court of Appeals equate the law applicable to "settlements" with the law applicable to "coven - ants not to sue" in this case when all of the Georgia law requires the application of different principles to contracts or agreements of these two types?

(2) Can the Fifth Circuit Court of Appeals hold that the language of Ga. Code Ann. SEct. 49-225 modifies and restricts the language of a guardian's bond when applicable Georgia court decisions hold otherwise?

(3) Can the Fifth Circuit Court of Appeals hold that a guardian has 'responded" to his ward as to a claim against a third per-

son tort feasor because such claim was fully reinstated as property of the ward by an adjudication by the proper court that the settlement by the guardian was 'void and of no effect' when the record shows that there has been no such adjudication by a court of proper jurisdiction?

(4) Can the Fifth Circuit Court of Appeals give the defendant in this case the benefit and credit for amounts paid by another party foreign to this cause of action and paid for a covenant not to sue in another cause of action?

(5) Can the Fifth Circuit Court of Appeals fail and refuse to follow precedents of State Court decisions, and its own decisions and sound principles of general law establishing that a judgment against a principle on a surety bond in a case in which the surety had full notice and opportunity to defend is binding and conclusive on the surety in the absence of fraud or collusion?

(6) Was the judgment of the trial court and the Fifth Circuit Court of Appeals that the claim for penalty and attorney's fees should not be submitted to a jury correct?

Statutes Involved

Ga. Code Ann. Sect. 38-624 Effect of judgment on party vouched into court.- Where a defendant may have a remedy over against another, and vouches him into court by giving him notice of the pendency of the suit, the

judgment rendered therein shall be conclusive upon the party vouched, as to the amount and right of the plaintiff to recover.

Ga. Code Ann. Sect. 49-225 Sureties bound though appointment of guardian void. If the appointment of a guardian for any cause shall be declared void, his sureties shall nevertheless be responsible on the bond for any property which may have been received by him by virtue or reason of his appointment.

Ga. Code Ann. Sect. 56-1206 Liability of insurer for damages and attorney's fees.- In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 25 per cent. of the liability of the insurer for the loss and all reasonable attorney's fees for the prosecution of the case against the insurer. The amount of such reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment which is rendered in such action: Provided however, such attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of such services, based on time spent and legal and factual issues involved in accordance with prevailing fees in the locality where such suit is pending: Prov-

judgment rendered thereon shall be conclusive upon the party vouched, as to the amount and right of the plaintiff to recover.

Gn. Code Ann. Sects. 56-125. Sureties bound though appointment of guardian void. If the appointment of a guardian for any one shall be declared void, his sureties shall nevertheless be responsible on the bond for any property which may have been received by him by virtue of said appointment.

Ga. Code Ann. Sect. 56-1206. Liability of insurer for damages and attorney's fees. In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding by the jury that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 25 per cent. of the liability of the insurer for the loss and a reasonable attorney's fees for the prosecution of the case, against the insurer. The amount of such reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment which is rendered in such action: Provided, however, such attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of such services, based on time spent and legal and factual issues involved in accordance with prevailing fees in the locality where such suit is pending; Prov-

ided, further, that the trial court shall have the discretion, if it finds such jury verdict fixing attorney's fees to be greatly excesssive or inadequate, to review and amend such portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this section in reference the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and his attorney for the services of such attorney in the action against the insurer.

Ga. Code Ann. Sect. 85-101 "Property," how term used.- The term 'property' is used not only to signify things real and personal owned, but to designate the right of ownership and that which is subject to be owned and enjoyed.

STATEMENT

The basis for federal jurisdiction in the U.S. District Court for the Northern District of Georgia in the first instance was diversity of citizenship and amount in controversy exceeding $10,000 and the action was removed from the State Court.

The trial court granted a partial judgment in favor of petitioner after both parties moved for summary judgment. The Circuit Court found error in the district court's findings, but came to the same mathematical result on different grounds.

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Cal. Code Ins. Sect. 85-102 "Property," how term used.- The term 'property' is used not only to signify things real and personal owned, but to designate the right of ownership and that which is subject to be owned and enjoyed.

STATEMENT

The basis for federal jurisdiction in the U.S. District Court for the Northern District of Georgia in the first instance was diversity of citizenship and amount in controversy exceeding $10,000 and the action was removed from the State Court.

The trial court granted a partial judgment in favor of petitioner after both parties moved for summary judgment. The Circuit Court found error in the district court's findings, but came to the same mathematical result on different grounds.

There are no issues as to the historical facts. On August 2, 1962, an automobile collision occurred between a vehicle driven by John P. Strother and a vehicle driven by Charles E. Tucker, Sr., who was accompanied by his family. In this collision Charles E. Tucker, Sr. received personal injuries and damages to his property. His wife, Shirley Tucker, was rendered mentally incompetent as a result of her personal injuries. Their son, Tony Tucker, age six months, was killed and their son, Charles E. Tucker, Jr. and daughter, Nancy Tucker, also received personal injuries.

The automobile driven by Strother had liability coverage with Hartford Accident & Indemnity Company. Subsequently, an attorney retained by Charles Tucker, Sr. to handle all these claims agreed with him on a settlement with Hartford Accident & Indemnity Company in the aggregate sum of $90,000. Since Shirley Tucker was mentally incompetent as a result of her injuries, in order to consummate the settlement of her claim for personal injuries and her claim for the death of her minor son, it was necessary for a guardian to be appointed.

On November 29, 1962, a petition was filed in the Court of Ordinary of Polk County, Georgia, by Charlie E. Tucker, Sr. alleging that Mrs. Shirley Tucker was of unsound mind and that a guardian should be appointed. A commission was appointed and there-

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The automobile driven by Strother had liability coverage with Hartford Accident & Indemnity Company. Subsequently, an attorney retained by Charles Tucker, Sr. to handle all these claims agreed with him on a settlement with Hartford Accident & Indemnity Company in the aggregate sum of $50,000. Since Shirley Tucker was mentally incompetent as a result of her injuries, in order to consummate the settlement of her claim for personal injuries and her claim for the death of her infant son, it was necessary for a guardian to be appointed.

On November 20, 1962, a petition was filed in the Court of Ordinary of Polk County, Georgia, by Charlie E. Tucker, Sr. alleging that Mrs. Shirley Tucker was of unsound mind and that a guardian should be appointed. A commission was appointed and there-

after on December 3, 1962, their return was filed finding that Mrs. Tucker was of unsound mind.

On December 4, 1962, Charles E. Tucker applied and was issued letters of Guardianship of his wife, Mrs. Shirley Tucker, alleging that as a result of the automobile collision of August 2, 1962, she was entitled to recover $35,000 from John F. Strother and/or Hartford Accident & Indemnity Company. On the same date, Tucker filed a bond in the amount of $70,000. The surety on the bond was defendant Great American.

On December 7, 1962, a petition was filed with the Ordinary of Polk County by Charles E. Tucker, Sr., setting out the facts of the claim for $35,000. On the same date an Order was entered by the Ordinary of Polk County approving the settlement and awarding the attorney one-third of the sum recovered as attorney's fees. Thereafter, on December 13, 1962, a release for $25,000 was executed by Charles E. Tucker, Sr. in favor of John P. Strother in extinguishment of the claim for injuries received by Mrs. Tucker and also a release for $10,000 was executed by Charles E. Tucker, Sr. in favor of John P. Strother in extinguishment of the claim of Mrs. Shirley Tucker for the death of her minor son, Tony. The consideration recited in the releases was paid.

About ten months later, on October 11, 1963, Mrs. Shirley Tucker, by and through her mother, Mrs. R. L. Clark as next friend, instituted three separate actions in three separate courts in Polk County, Georgia. These actions were as follows:

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About ten months later, on October 11, 1963, Mrs. Shirley Tucker, by and through her mother, Mrs. R. L. Clark as next friend, instituted three separate actions in three separate courts in Polk County, Georgia. These actions were as follows:

(a) Proceedings in the Court of Ordinary of Polk County, Georgia.

(b) Proceedings in the Superior Court of Polk County, Georgia.

(c) Proceedings in the City Court of Polk County, Georgia.

(a) A suit was instituted in the Court of Ordinary of Polk County, Georgia, alleging that Charles E. Tucker as guardian of Mrs. Shirley Tucker had wasted and mismanaged the property of Mrs. Shirley Tucker and was unfit for the trust as guardian. It was alleged that the lunacy commission which purported to examine into the mental condition and necessity of having a guardian appointed for Mrs. Shirley Tucker, did not examine Mrs. Shirley Tucker and did not have any evidence submitted to it with reference to the issues involved. It was contended that the Letters of Guardianship were void for this reason and that the purported settlement between Charles E. Tucker and John P. Strother purportedly approved by the Court of Ordinary was void. That proceeding was ultimately appealed to the Superior Court of Polk County and on September 4, 1964, at the direction of the court, the jury returned a verdict that the appointment of Charles E. Tucker, Sr., as guardian of Shirley Tucker, was void *ab initio* for failure of the commission appointed in the proceeding to examine Mrs. Shirley Tucker. Judgment was entered to this effect on September 9, 1964. Said verdict and judgment was unappealed and became final.

(b) A suit was filed in the Superior Court of Polk County against Charles E. Tucker, individually and in his capacity as guardian for Mrs. Shirley Tucker; Hartford Accident & Indemnity Company and John P. Strother. In Count One it was alleged that Hartford was the liability carrier for Strother and that defendants, Charles Tucker, Sr. and Hartford falsely and fraudulently entered into a plan to settle all of the Tucker claims for $90,000 of which only $35,000 was allocated to Shirley Tucker when in fact her claims were more valuable. It alleged that the subsequent lunacy commission, appointment of guardian and settlement of the claim in the Court of Ordinary was obtained by fraud and should be set aside. The relief sought in that Count was for the Court to restrain Charles Tucker, Sr. from interfering with Mrs. Clark, for a receiver to be appointed to take charge of the remainder of the funds held by Charles E. Tucker, Sr., as guardian of Shirley Tucker, and that custody of plaintiff be awarded to Mrs. Clark and that the settlement of Mrs. Tucker's claim for $35,000 be set aside and voided because of fraud.

In Count Two, damages against Strother for the injuries received by Mrs. Tucker and for the death of her minor son were sought. Count Three alleged that the appointment of the guardian and subsequent settlement of the claim of Mrs. Shirley Tucker was null and void because of the failure of the lunacy commission to examine Shirley Tucker.

On February 18, 1964, Charles E. Tucker, Sr., through his counsel, D. B. Howe, agreed to deposit all

funds held by him as guardian of Mrs. Shirley Tucker in the registry of the Court and subsequently on March 13, 1964, "slightly" in excess of $12,000" was so deposited and thereafter these sums were paid to Mrs. Clark on order of the court for the use of and benefit of Shirley Tucker.

On November 26, 1965, plaintiff filed a Motion to Dismiss the action alleging that Mrs. R.L. Clark had been appointed guardian of the person and property of Shirley Tucker and had entered a covenant and agreement not to sue with Hartford and John P. Strother to dismiss the suit for personal injuries and for the death of her minor child for a total of $50,000, insofar as defendants Hartford and Strother were concerned. This agreement was approved by the Ordinary of Polk County, Ga.

(c) A suit was filed in the City Court of Polk County against Chas. E. Tucker, individually and as guardian for Shirley Tucker and Great American. It recited that Shirley Tucker had recived injuries in an accident resulting in mental incompetence on her part and in death of her child. It alleged that Chas. E. Tucker was appointed guardian for Shirley Tucker and Great American was surety on bond for $70,000. And it charged that defendant Tucker, as guardian for Shirley Tucker, committed various acts which breached his duty as guardian. It claimed he settled her greater claims for

funds held by him as guardian of Mrs. Shirley Tucker in the registry of the Court and subsequently on March 13, 1964, "slightly in excess of $12,000" was so deposited and thereafter those sums were paid to Mrs. Clark on order of the court for the use of and benefit of Shirley Tucker.

On November 26, 1965, plaintiff filed a Motion to Dismiss the action alleging that Mrs. K.L. Clark had been appointed guardian of the person and property of Shirley Tucker and had entered a covenant and agreement not to sue with Hartford and John P. Strother to dismiss the suit for personal injuries, and for the death of her minor child, for a total of $50,000. Insofar as defendants Hartford and Strother were concerned. This agreement was approved by the Ordinary of Polk County, Ga.

(c) A suit was filed in the City Court of Polk County against Clara E. Tucker, individually and as guardian for Shirley Tucker and Great American. It recited that Shirley Tucker had received injuries in an accident resulting in mental incompetence on her part and in death of her child. It alleged that Clara E. Tucker was appointed guardian for Shirley Tucker and Great American was surety on bond for $10,000. And it charged that defendant Tucker, as guardian for Shirley Tucker, committed various acts which breached his duty as guardian. It claimed he settled her greater claims for

suffering and permanent injuries and for the death of her child for only $35,000, far below their actual value, while settling his personal claims for $51,000, an amount far in excess of their actual value. It also alleged that he squandered the $35,000 he did receive as settlement for her claims, committing Shirley Tucker to the State Hospital for mental patients at Milledgeville, Georgia, and spending part of her funds on personal activities, including several months in a bigamous marriage.

Subsequently, on February 24, 1964, defendant Great American was voluntarily dismissed, without prejudice, in a consent order signed by both parties.

On Tuesday, December 28, 1966, counsel for plaintiff sent a letter to Henry A. Stewart, attorney for Great American, stating as follows:

> "This is to notify you as attorney of record for Great American Insurance Company . . . . that the plaintiff will have no objection to a motion on behalf of Great American Insurance Company to have the dismissal vacated or to intervene in the action and make any defense that might be available at this time. I have discussed this with Mr. D. B. Howe, attorney for the remaining defendant Charles E. Tucker, Sr., and understand that he is also willing for your client to intervene in the action to protect its interests.
>
> "As you know, this case is on the trial calendar as the number one case for trial Monday, January 3rd."

D. B. Howe, attorney for defendant Charles E. Tucker, Sr., talked with Great American's attorney Stewart over the telephone four or five days prior to trial, informing him that defendant Tucker was unavailable and that no defenses were available to be presented.

On Thursday, December 30, 1965, attorney Henry A. Stewart forwarded this letter to the defendant Great American's Atlanta office.

Defendant Great American made no official appearance in court when the case came to trial, on January 3, 1966.

At the trial, it was found that Defendant Charles E. Tucker, Sr. had no defense to present, and that he had absconded and could not be located by his own counsel. Evidence was presented and a verdict and judgment was rendered in favor of the plaintiff against defendant Charles E. Tucker, Sr., individually, and as guardian of Shirley Tucker, in the amount of $70,000. This judgment was unappealed and became final.

Subsequently, on March 8, 1966, Mrs. R. L. Clark, as legal guardian of Shirley Tucker, instituted this suit in the City Court of Polk County, against defendant Great American for judgment in the above case, in the principal amount of $70,000, for $17,500 penalty and for $23,333.33 as attorney's fees. The case was removed to this Court.

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Upon motion for summary judgment, it was decided by the trial court that the plaintiff should recover of defendant $35,000 (the amount received by defendant's principal) less $12,012.79 paid by said principal into court in another action. The trial court also decided that plaintiff's tort claim against a third party was not 'property' and that the guardian's bond did not cover a failure of trust on the part of the guardian in settling such a claim fraudulently.

Petitioner appealed to the Fifth Circuit Court of Appeals on the grounds that the term "property" was broad enough to cover a tort claim of the ward, under the applicable statute, and that the bond covered negotiations by the guardian resulting in the fraudulent consummation of a plan after the guardian's appointment against the interest of the ward and favorable to the guardian.

The Fifth Circuit Court of Appeals held that petitioner's points on appeal were well taken, but , petitioner respectfully submits to this Honorable Court, completely ignored the well established law that distinguishes "covenants not to sue" in Georgia from "settlements"; ignored binding State and Federal decisions (and the Georgia statute) making judgments against principals binding on the surety where the surety had notice of the action in which the principal was sued and had an opportunity to defend; interpreted into the word 'responsible' meanings which the

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Petitioner appealed to the Fifth Circuit Court of Appeals on the grounds that the term "property" was broad enough to cover a tort claim of the ward, under the applicable statute, and that the bond covered negotiations by the guardian resulting in the fraudulent conversion of a plan after the guardian's appointment against the interests of the ward and favorable to the guardian.

The Fifth Circuit Court of Appeals held that petitioner's points on appeal were well taken, but petitioner respectfully submits to this Honorable Court, completely ignored the well established law that distinguishes "covenants not to sue" in general from "settlements"; ignored binding State and Federal decisions (and the general statute) making judgments against principals binding on the surety where the surety had notice of the action in which the principal was sued and had an opportunity to defend; interpreted into the word 'responsible' meanings which the

dictionary and the law find foreign to all reason and precedent; and found as a matter of fact which was pure fabrication and contrary to the record that " the claim against the tort feasor Strother and his insurance carrier...was fully reinstated as property of the ward by the adjudication by the proper court that the settlement of the claim by Tucker was void and of no effect."

REASONS FOR GRANTING THIS WRIT

Petitioner submits to this Honorable Court that the writ of certiorari should issue to the Fifth Circuit Court of Appeals because it is important and greatly in the public interest that the substantive law of Georgia, including its statutes and decisions, be construed and applied consistently and uniformly by both State and Federal courts. We submit that the judgment sought to be reviewed involves a complete departure from the Georgia Statute and decisions of the State Court construing it holding that a judgment against a principal in a case in which the surety has been vouched as a party is binding as to liability and as to amount against the surety in the absence of fraud or collusion. The judgment sought to be reviewed is also contrary to decisions of the Fifth Circuit Court of Appeals itself in similar cases. It seeks to equate "covenants not to sue" and agreements of "settlement" in conflict with applicable local decisions; and it is based upon an erroneous statement of fact not shown by the record, but refuted by the record.

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Argument & Citation of Authorities with reference to Question # (1):

In the opinions of both the District Court and the Court of Appeals, reference is repeatedly made to the 'settlement' made by petitioner of her ward's claims for personal injuries & death of her child after the defendant's principal was removed and your petitioner was appointed as successor guardian, and it is clear that in arriving at the judgments sought to be reviewed, both of the courts applied the law of 'settlement' to the agreement made by her with Strother and Hartford in the State Court Action.

We respectfully submit that applicable decisions of the Georgia appellate courts are directly contrary to the position that an agreement or covenant not to sue one of several joint tort feasors operates to release all of them.

See *ROY V. GA. RR. & BANKING CO.*
24 Ga App 86 @ 90

" A covenant not to sue one jointly liable will not serve to release any other than the one with whom the covenant not to sue is entered into."

For the provisions of the agreement in question, see (R. p 117) " there be executed.....a contract or covenant, forever binding the said Mrs. Shirley C. Tucker... never to institute any suit at law or in equity against said John P. Strother or said Hart-

Argument & Citation of Authorities with reference to Question # (1):

In the opinions of both the District Court and the Court of Appeals, reference is repeatedly made to the 'settlement' made by petitioner of Mgr ward's claims for personal injuries & death of her child after the defendant's principal was removed and your petitioner was absolved as unnecessary guardian, and it is clear that in arriving at the judgments sought to be reviewed, both of the Courts applied the law of 'settlement' to the agreement made by Mrs. with Strother and reported in the State Court Action.

We respectfully submit that applicable decisions of the Supreme Court of the United States are directly contrary to the position that an agreement on covenant not to sue by one of several joint tort feasors operates to release all of them.

See ROY V. GA. RR. & BANKING CO.
24 Ga App 86 @ 90

" A covenant not to sue one jointly liable will not serve to release any other than the one with whom the covenant not to sue is entered into."

For the provisions of the agreement in question, see (R. p 117) " there be executed..... a contract or covenant, forever binding the said Mrs. Shirley C. Tucker... never to institute any suit at law or in equity against said John P. Strother or said Hurt-

ford Accident and Indemnity Company, or both of them, never to pursue, press or take a judgment in any suit at law or in equity , which may now or hereafter be pending in which the said John P. Strother or Hartford Accident and Indemnity Company, or both of them, are parties defendant..."

And see @ p. 119 Record " Petitioner attaches hereto as Exhibit "A" ...a proposed agreement or covenant.....that this Court approve the proposed giving of the covenant and agreement not to sue....etc"

Argument & Citation of Authorities with reference to Question # (2):

Both the trial court and Fifth Circuit Court of Appeals have held that the language of the statute (Ga. Code Ann. Sect. 49-225) modifies and restricts the language of the guardian's bond sued on in this case so as to take it out of the general rule applicable to judgments against principals being binding on sureties who were vouched into court to defend the action. We submit that no such modification exists, but on the contrary, the Georgia courts have held that the liability of guardians in cases where the guardianship was later voided can not be distinguished from the liability of guardians appointed regularly and properly, in so far as property which was brought under the dominion and control of the guardian is concerned.

See *Griffin v. Collins*, 122 Ga 102 @ 106

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ford Accident and Indemnity Company, or both of them, never to pursue, press or take a judgment in any suit at law or in equity, which may now or hereafter be pending in which the said John P. Strether or Hartford Accident and Indemnity Company, or both of them, are parties defendant..."

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Argument & Citation of Authorities with reference to Question # (2):

Both the trial court and fifth Circuit Court of Appeals have held that the language of the statute (Ga. Code Ann. Sect. 113-2215) modifies and restricts the language of the guardian's bond sued on in this case so as to take it out of the general rule applicable to judgments against principals being binding on sureties who were vouched into court to defend the action. We submit that no such modification exists, but on the contrary, the Georgia courts have held that the liability of guardians in cases where the guardianship was later voided can not be distinguished from the liability of guardians appointed regularly and properly, in so far as property which was brought under the dominion and control of the guardian is concerned.

See Griffin v. Griffin, 122 Ga 102 @ 106

" But, having gone into the court or ordinary and invoked its power of appointment of a guardian-- having gained control of the property of this unfortunate woman through his successful efforts to have him self appointed guardian in a case where the law does not provide for the appointment of a guardian, can Griffin now be heard to deny the legality or validity of his appointment, or avoid the liability thereby voluntarily assumed? And can his bondsmen, who were charged with knowledge of the law, and who came forward to fulfil the conditions imposed by the ordinary as a prerequisite to his appointment as guardian, now escape liability on the bond by reason of the fact that the appointment was not authorized by law? The first question is easily answered in the negative....As to the sureties, their liability is determined by the Civil Code, Sec 2554, where it is provided that even if the appointment of a guardian for any cause is declared void, they shall nevertheless be responsible on the bond for any property which may have been received by him by virtue of his appoinement as guardian. It is idle, therefore, to further discuss the authority of the ordinary to appoint a guardian for Harriet A. Lane as affecting the liability of the obligors of the bond now sued on. "

In the case above quoted, the guardian and sureties were sued together on the bond for fraud on the part of the guardian.

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" But, having gone into the court on ordinary and invoked its power of appointment of a guardian -- having gained control of the property of this unfortunate woman through his successful efforts to have him self appointed guardian in a case where the law does not provide for the appointment of a guardian, can Griffin now be heard to deny the legality or validity of his appointment, or avoid the liability thereby voluntarily assumed? And can his bondsmen, who were charged with knowledge of the law, and who came forward to fulfil the conditions imposed by the ordinary as a prerequisite to his appointment as guardian, now escape liability on the bond by reason of the fact that the appointment was not authorized by law? The first question is easily answered in the negative.... As to the sureties, their liability is determined by the Civil Code, Sec 2554, where it is provided that even if the appointment of a guardian for any cause is declared void, they shall nevertheless be responsible on the bond for any property which may have been received by him by virtue of his appointment as guardian. It is idle, therefore, to further discuss the authority of the ordinary to appoint a guardian for Harriet A. Lane as affecting the liability of the obligors of the bond now sued on. "

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by counsel for the plaintiff in the court below that the receipt and settlement were void for lack of capacity in Harriet A. Lane to make them, and for fraud on the part of Griffin in concealing from Her the real state of his accounts."

And @ p. 109 " It could not have been intended that in the case of wards, around whom the law throws the most jealous protection, a limitation of four years should operate to bar the right to sue the guardian and sureties for money remaining due on a fraudulent settlement."

The same case was subsequently in the Georgia Supreme Court and it approved the method of assessing damages against the guardian and sureties in such a case as the present one as follows:

See *Griffin vs. Collins, 125 Ga 159 @ 165:*
" If any property went into Collins's (the guardian's) hands and was accounted for, the guardian should be credited, not with the amount fixed by Collins's receipt, but by the actual value of the property, whatever it might have been."

It has been, and is now petitioner's position that she is entitled to recover against the surety in this suit the difference in the amount realized by the guardian on his fraudulent settlement and the actual value of her claims, and that such amount was established by the jury verdict in the action against the principal.

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The same case was subsequently in the Georgia Supreme Court and it approved the method of assessing damages against the guardian and sureties in such a case as the present one as follows:

See Graves vs. Coffins, 125 Ga 159 @ 165: "If any property went into Collins's (the guardian's) hands and was accounted for; the guardian should be credited, not with the amount fixed by Collins's receipt, but by the actual value of the property, whatever it might have been."

It has been, and is now petitioner's position that she is entitled to recover against the surety in this suit the difference in the amount realized by the guardian on his fraudulent settlement and the actual value of her claims, and that such amount was established by the jury verdict in the action against the principal.

The judgment of the Fifth Circuit Court of Appeals in this action is based (See Appendix A, p. 14 hereto) on a finding that " ... as to two species of property, the guardian did respond and thus discharged his obligation to be 'responsible' as to such property. These two items were the sum of $12,012.79, which he turned over to the new guardian for his ward, and the claim against the tort feasor Strother and his insurance carrier which was fully reinstated as property of the ward by the adjudication by the proper court that the settlement of that claim by Tucker was void and of no effect."

The suit brought for the removal of the principal did not result in an adjudication with reference to the settlement. See Vol. I. p. 61 of Record filed in this court: " ... it is hereby adjudged that the proceeding wherein Charles E. Tucker Sr. was appointed as guardian for Shirley Tucker and the letters issued to him in said case were all void ab initio and of no legal force or consequence, and the same are hereby set aside." No mention was made in the judgment of the settlement agreement entered into by the guardian and principal on the bond sued on.

The suit brough to set aside the settlement and thereafter proceed against Strother for her damages, resulted in the giving of the covenant not to sue, and the judgment in that case, (Vol. I Record,

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The judgment of the Fifth Circuit Court of Appeals in this action is based (See Appendix) on a finding that

" ... as to two special pt property, the guardian did respond and thus discharged his obligation to be 'responsible' as to such property. These two items were the sum of $12,012.79 , which he turned over to the new guardian for his ward, and the claim against the tort feasor stretches and his insurance carrier which was fully instituted by the property of the ward by the adjudication by the probate court that the settlement of that claim by Tucker was void and of no effect."

The suit brought for the removal of the principal did not result in an adjudication with reference to the settlement. See Vol. 4, p. 91 of Record filed in this court: " ... it is hereby adjudged that the proceeding whereby Charles E. Tucker, Sr. was appointed as guardian for Shirley Tucker, and the letters issued to him in said case were void ab initio and of no legal force or consequence, and the same are hereby set aside." No mention was made in the judgment of the settlement entered into by the guardian and principal on the bond sued on.

The suit brought to set aside the settlement and thereafter prosecuted against Stricker for her damages, resulted in the waiver of the covenant not to sue, and the judgment in that case, (Vol. 1 Record,

p. 132) was as follows: "...It is hereby considered, ordered and adjudged, that the plaintiff's petition, as amended, in the above stated action, and said action, be and the same is hereby dismissed with prejudice as to the defendants John P. Strother and Hartford Accident and Indemnity Co.

The restraining order against defendant Charles E. Tucker, Sr., previously entered is made a permanent injunction and otherwise the case is dismissed without prejudice as to defendant Charles E. Tucker, Sr."

We respectfully submit, therefore, that the decision of the Fifth Circuit Court of Appeals in this case was based upon an erroneous statement of the facts as clearly shown by the record which requires a different judgment.

We cite the same authorities with reference to Question # 4 as set out above with reference to Question # 2.

Argument and citation of authorities with reference to Question # 5:

The Georgia Courts have consistently held that a judgment against a principal on a surety bond is binding and conclusive on the surety when the surety had full notice and an opportunity to defend.

See: *Brown v. Cheney, 1 Ga 410*

The Fifth Circuit Court of Appeals in another case has held to the same effect, see

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p. 132) was as follows: "...It is hereby considered, ordered and adjudged, that the plaintiff's petition, as amended, in the above stated action, and said action, be and the same is hereby dismissed with prejudice as to the defendants John P. Stretcher and Hartford Accident and Indemnity Co.

The restraining order against defendant Charles E. Tucker, Sr., previously entered is made a permanent injunction and otherwise the case is dismissed without prejudice as to defendant Charles E. Tucker, Sr."

We respectfully submit, therefore, that the decision of the Fifth Circuit Court of Appeals in this case was based upon an erroneous statement of the facts as clearly shown by the record which requires a different judgment.

We cite the same authorities with reference to Question # 4 as set out above with reference to Question # 2.

Argument and citation of authorities with reference to Question # 5:

The Georgia Courts have consistently held that a judgment against a principal on a surety bond is binding and conclusive on the surety when the surety had full notice and an opportunity to defend.

See: Brown v. Chenaz, 1 Ga 410

The Fifth Circuit Court of Appeals in another case has held to the same effect, see

277 Fed 2nd 397, Seaboard Surety Co v. Westwood: @ p 8-

" In view of another trial, we think it proper to say, upon the point appellant makes as to the effect of his judgment against Hardee, that while the authorities are apparently in dispute, we think the true statement of the law is this: Where it appears that the judgment against the defendant was obtained in a suit of which the surety had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense except that of fraud or collusion in obtaining it."

Also see p. 3 of this brief, Ga. Code Ann Sect. 38-624 which is the statutory expression of the same principle .

With reference to Question # (6), we submit that from the authorities contained herein, if the petitioner was entitled to a summary judgment for $70,000 the issue of attorney's fees and penalty was for the jury.

See: *Glen Falls Indemnity Co. v. Gottlieb 76 Ga App 70*

John Church Co v. Aetna Indemn. Co 13 Ga App 826

Home Sav. Bk. of Cols. v. Mass. Bdg. 19 Ga App 352.

Surely all of the foregoing reasons are of sufficient gravity and importance to the public to authorize and require a correction of the errors committed by the Fifth Circuit Court of Appeals, to say nothing of the great individual and personal rights of the petitioner to have justice done to her in accordance with the same rules of law applied in her case in the same way and manner as they are applied to others. Petitioner was rendered in truth only a "vegetable" by the third party tort feasor. Her husband and first guardian (the principal on the bond sued on) took advantage of her incompetence and disability to defraud her of her rights. The defendant was vouched into court in her action on the bond against her first guardian, but declined to defend the actions of its principal and sufferred a judgment to be entered for $70,000. The Federal Courts in this removed action should not deprive her of the rights she is entitled to as a resident of Georgia under that state's laws.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Fifth Circuit Court of Appeals should be granted.

Respectfully,

CECIL D. FRANKLIN

MARSON G. DUNAWAY, JR.
Counsel for Petitioner
P.O. Box 269, Rockmart, Ga.

Appendix A Attached.

Surely all of the foregoing reasons are of sufficient gravity and importance to the public to authorize and require a correction of the errors committed by the Fifth Circuit Court of Appeals, to any nothing of the great individual and personal rights of the petitioner to have justice done to her in accordance with the same rules of law applied in her case in the same way and manner as they are applied to others. Petitioner was rendered in truth only a "constable" by the third party to the agency. Her husband and first purchaser (the principal on the bond sued on) took advantage of her incompetence and disability to defraud her of her rights. The defendant was vouched into court to protect on the bond against her first warranty, but declined to defend the actions of his principal and suffered a judgment to be entered for $70,000. The Federal Courts in this removed action should not deprive her of the rights she is entitled to as a resident of Georgia under that state's laws.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Fifth Circuit Court of Appeals should be granted.

Respectfully,

CECIL D. FRANKLIN

MARION G. DUNAWAY, JR.
Counsel for Petitioner
P.O. Box 269, Rockmart, Ga.
Appendix A Attached.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,602

MRS. R. L. CLARK, As Legal Guardian
For SHIRLEY TUCKER

Appellant,

v.

GREAT AMERICAN INSURANCE COMPANY OF NEW YORK,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(February 13, 1968)

ON PETITION FOR REHEARING

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges. PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby DENIED.

Appendix A.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24602

D. C. Docket No. CA 1779

MRS. R.L. CLARK, As Legal Guardian
For SHIRLEY TUCKER

Appellant,

versus

GREAT AMERICAN INSURANCE COMPANY OF NEW YORK,

Appellee.

Appeal from the United States District for the
Northern District of Georgia

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that

the appellant, Mrs. R.L. Clark, as legal guardian for Shirley Tucker, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 19, 1967

Issued as Mandate: FEB 21, 1968

Appendix A

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24602

MRS. R. L. CLARK, as legal guardian for Shirley Tucker,
Appellant,

versus

GREAT AMERICAN INSURANCE COMPANY OF NEW YORK,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(December 19, 1967.)

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a summary judgment granted in favor of the appellant, in which the trial court granted a partial judgment against the former guardian of appellant's ward. Appellant's contention here is that the trial court erred in not granting a summary judgment in the full sum of $70,000.00, the amount of default judgment taken by

her against the former guardian after notice to the surety company, and for penalty and attorneys' fees.

There are no issues as to the historical facts. On August 2, 1962, an automobile collision occurred between a vehicle driven by John P. Strother and a vehicle driven by Charles E. Tucker, Sr., who was accompanied by his family. In this collision Charles E. Tucker, Sr. received personal injuries and damages to his property. His wife, Shirley Tucker, was rendered mentally incompetent as a result of her personal injuries. Their son, Tony Tucker, age six months, was killed and their son, Charles E. Tucker, Jr. and daughter, Nancy Tucker, also received personal injuries.

The automobile driven by Strother had liability coverage with Hartford Accident & Indemnity Company. Subsequently, an attorney retained by Charles Tucker, Sr. to handle all these claims agreed with him on a settlement with Hartford Accident & Indemnity Company in the aggregate sum of $90,000. Since Shirley Tucker was mentally incompetent as a result of her injuries, in order to consummate the settlement of her claim for personal injuries and her claim for the death of her minor son, it was necessary for a guardian to be appointed.

On November 29, 1962, a petition was filed in the Court of Ordinary of Polk County, Georgia, by Charlie E. Tucker, Sr. alleging that Mrs. Shirley Tucker was of unsound mind and that a guardian should be appointed. A commission was appointed and there-

her against the former guardian after notice to the surety company, and for penalty and attorney's fees.

There are no issues as to the historical facts. On August 2, 1962, an automobile collision occurred between a vehicle driven by John P. Strother and a vehicle driven by Charles E. Tucker, Sr., who was accompanied by his family. In this collision Charles E. Tucker, Sr. received personal injuries and damages to his property. His wife, Shirley Tucker, was rendered mentally incompetent as a result of her personal injuries. Their son, Tony Tucker, age six months, was killed and their son, Charles E. Tucker, Jr. and daughter, Nancy Tucker, also received personal injuries.

The automobile driven by Strother had liability coverage with Hartford Accident & Indemnity Company. Subsequently, an attorney retained by Charles Tucker, Sr. to handle all these claims agreed with him on a settlement with Hartford Accident & Indemnity Company in the aggregate sum of $30,000. Since Shirley Tucker was mentally incompetent as a result of her injuries, in order to consummate the settlement of her claim for personal injuries and her claim for the death of her minor son, it was necessary for a guardian to be appointed.

On November 29, 1962, a petition was filed in the Court of Ordinary of Polk County, Georgia, by Charlie E. Tucker, Sr. alleging that Mrs. Shirley Tucker was of unsound mind and that a guardian should be appointed. A commission was appointed and there-

after on December 3, 1962, their return was filed finding that Mrs. Tucker was of unsound mind.

On December 4, 1962, Charles E. Tucker applied and was issued letters of Guardianship of his wife, Mrs. Shirley Tucker, alleging that as a result of the automobile collision of August 2, 1962, she was entitled to recover $35,000 from John F. Strother and/or Hartford Accident & Indemnity Company. On the same date, Tucker filed a bond in the amount of $70,000. The surety on the bond was defendant Great American.

On December 7, 1962, a petition was filed with the Ordinary of Polk County by Charles E. Tucker, Sr., setting out the facts of the claim for $35,000. On the same date an Order was entered by the Ordinary of Polk County approving the settlement and awarding the attorney one-third of the sum recovered as attorney's fees. Thereafter, on December 13, 1962, a release for $25,000 was executed by Charles E. Tucker, Sr. in favor of John P. Strother in extinguishment of the claim for injuries received by Mrs. Tucker and also a release for $10,000 was executed by Charles E. Tucker, Sr. in favor of John P. Strother in extinguishment of the claim of Mrs. Shirley Tucker for the death of her minor son, Tony. The consideration recited in the releases was paid.

About ten months later, on October 11, 1963, Mrs. Shirley Tucker, by and through her mother, Mrs. R. L. Clark as next friend, instituted three separate actions in three separate courts in Polk County, Georgia. These actions were as follows:

after on December 3, 1962, their return was filed finding that Mrs. Tucker was of unsound mind.

On December 4, 1962, Charles F. Tucker applied and was issued letters of Guardianship of his wife, Mrs. Shirley Tucker, alleging that as a result of the automobile collision of August 2, 1962, she was entitled to recover $35,000 from John P. Strother and/or Hartford Accident & Indemnity Company. On the same date, Tucker filed a bond in the amount of $70,000. The surety on the bond was defendant Great American.

On December 6, 1962, a petition was filed with the Ordinary of Polk County by Charles F. Tucker, Sr., setting out the facts of the claim for $35,000. On the same date an Order was entered by the Ordinary of Polk County approving the settlement and awarding the attorney's fee allowed of the sum recovered as attorney's fees. Thereafter, on December 13, 1962, a release for $35,000 was executed by Charles F. Tucker, Sr. in favor of John P. Strother in extinguishment of the claim for injuries received by Mrs. Tucker and also a release for $10,000 was executed by Charles F. Tucker, Sr. in favor of John P. Strother in extinguishment of the claim of Mrs. Shirley Tucker for the death of her minor son, Tony. The consideration recited in the releases was paid.

About ten months later, on October 11, 1963, Mrs. Shirley Tucker, by and through her mother, Mrs. R. L. Clark as next friend, instituted three separate actions in three separate courts in Polk County, Georgia. These actions were as follows:

(a) Proceedings in the Court of Ordinary of Polk County, Georgia.

(b) Proceedings in the Superior Court of Polk County, Georgia.

(c) Proceedings in the City Court of Polk County, Georgia.

(a) A suit was instituted in the Court of Ordinary of Polk County, Georgia, alleging that Charles E. Tucker as guardian of Mrs. Shirley Tucker had wasted and mismanaged the property of Mrs. Shirley Tucker and was unfit for the trust as guardian. It was alleged that the lunacy commission which purported to examine into the mental condition and necessity of having a guardian appointed for Mrs. Shirley Tucker, did not examine Mrs. Shirley Tucker and did not have any evidence submitted to it with reference to the issues involved. It was contended that the Letters of Guardianship were void for this reason and that the purported settlement between Charles E. Tucker and John P. Strother purportedly approved by the Court of Ordinary was void. That proceeding was ultimately appealed to the Superior Court of Polk County and on September 4, 1964, at the direction of the court, the jury returned a verdict that the appointment of Charles E. Tucker, Sr., as guardian of Shirley Tucker, was void *ab initio* for failure of the commission appointed in the proceeding to examine Mrs. Shirley Tucker. Judgment was entered to this effect on September 9, 1964. Said verdict and judgment was unappealed and became final.

(a) Proceedings in the Court of Ordinary of Polk County, Georgia.

(b) Proceedings in the Superior Court of Polk County, Georgia.

(c) Proceedings in the City Court of Polk County, Georgia.

(d) A suit was instituted in the Court of Ordinary of Polk County, Georgia, alleging that Charles E. Tucker, as guardian of Mrs. Shirley Tucker had wasted and mismanaged the property of Mrs. Shirley Tucker and was unfit for the trust as guardian. It was alleged that the lunacy commission which purported to examine into the mental condition and necessity of having a guardian appointed for Mrs. Shirley Tucker, did not examine Mrs. Shirley Tucker and did not have any evidence submitted to it with reference to the issue involved. It was contended that the Letters of Guardianship were void for this reason and that the purported settlement between Charles E. Tucker and John F. Strother purportedly approved by the Court of Ordinary was void. That proceeding was ultimately appealed to the Superior Court of Polk County and on September 4, 1956, at the direction of the court, the jury returned a verdict that the appointment of Charles E. Tucker, Sr., as guardian of Shirley Tucker, was void ab initio for failure of the commission appointed in the proceeding to examine Mrs. Shirley Tucker. Judgment was entered to this effect on September 9, 1956. Said verdict and judgment was unappealed and became final.

(b) A suit was filed in the Superior Court of Polk County against Charles E. Tucker, individually and in his capacity as guardian for Mrs. Shirley Tucker; Hartford Accident & Indemnity Company and John P. Strother. In Count One it was alleged that Hartford was the liability carrier for Strother and that defendants, Charles Tucker, Sr. and Hartford falsely and fraudulently entered into a plan to settle all of the Tucker claims for $90,000 of which only $35,000 was allocated to Shirley Tucker when in fact her claims were more valuable. It alleged that the subsequent lunacy commission, appointment of guardian and settlement of the claim in the Court of Ordinary was obtained by fraud and should be set aside. The relief sought in that Count was for the Court to restrain Charles Tucker, Sr. from interfering with Mrs. Clark, for a receiver to be appointed to take charge of the remainder of the funds held by Charles E. Tucker, Sr., as guardian of Shirley Tucker, and that custody of plaintiff be awarded to Mrs. Clark and that the settlement of Mrs. Tucker's claim for $35,000 be set aside and voided because of fraud.

In Count Two, damages against Strother for the injuries received by Mrs. Tucker and for the death of her minor son were sought. Count Three alleged that the appointment of the guardian and subsequent settlement of the claim of Mrs. Shirley Tucker was null and void because of the failure of the lunacy commission to examine Shirley Tucker.

On February 18, 1964, Charles E. Tucker, Sr., through his counsel, D. B. Howe, agreed to deposit all

(b) A suit was filed in the Superior Court of Polk County against Charles E. Tucker, individually and in his capacity as guardian for Mrs. Shirley Tucker; Hartford Accident & Indemnity Company and John P. Strother. In Count One it was alleged that Hartford was the liability carrier for Strother and that defendants, Charles Tucker, Sr. and Hartford falsely and fraudulently entered into a plan to settle all of the Tucker claims for $90,000 of which only $35,000 was allocated to Shirley Tucker when in fact her claims were more valuable. It alleged that the subsequent lunacy commission appointment of guardian and settlement of the claim in the Court of Ordinary was obtained by fraud and should be set aside. The relief sought in that Count was for the Court to restrain Charles Tucker, Sr. from interfering with Mrs. Clark, former receiver to be appointed to take charge of the remainder of the funds held by Charles E. Tucker, Sr., as guardian of Shirley Tucker, and that custody of plaintiff be awarded to Mrs. Clark and that the settlement of Mrs. Tucker's claim for $35,000 be set aside and voided because of fraud.

In Count Two, damages against Strother for the injuries received by Mrs. Tucker and for the death of her minor son were sought. Count Three alleged that the appointment of the guardian and subsequent settlement of the claim of Mrs. Shirley Tucker was null and void because of the failure of the lunacy commission to examine Shirley Tucker.

On February 18, 1954, Charles E. Tucker, Sr., through his counsel, D. B. Howe, agreed to deposit all

funds held by him as guardian of Mrs. Shirley Tucker in the registry of the Court and subsequently on March 13, 1964, "slightly in excess of $12,000" was so deposited and thereafter these sums were paid to Mrs. Clark on order of the court for the use and benefit of Shirley Tucker.

On November 26, 1965, plaintiff filed a Motion to Dismiss the action alleging that Mrs. R. L. Clark had been appointed guardian of the person and property of Shirley Tucker and had entered a covenant and agreement not to sue with Hartford and John P. Strother to settle her claim for personal injuries and for the death of her minor child for a total of $50,000. This settlement was approved by the Ordinary of Polk County, Georgia. The sum of $50,000 was received and the settlement was consummated in December, 1965.

(c) A suit was filed in the City Court of Polk County against Charles E. Tucker, individually and as guardian of Shirley Tucker and Great American. It recited that Shirley Tucker had received permanent injuries in an accident resulting in mental imcompetence on her part and in the death of her child. It alleged that defendant Charles E. Tucker was appointed guardian of Shirley Tucker and that Great American issued a Guardian's Bond in the amount of $70,000. In essence, it charged that defendant Tucker, as guardian for Shirley Tucker, committed various acts which breached his duty as guardian. It was claimed that he settled her more serious claims for pain and

suffering and permanent injuries and for the death of her child for only $35,000, far below their actual value, while settling his personal claims for $51,000, an amount far in excess of their actual value. It also alleged that he squandered the $35,000 he did receive as settlement for her claims, committing Shirley Tucker to the State Hospital for mental patients at Milledgeville, Georgia, and spending part of her funds on personal activities, including several months in a bigamous marriage.

Subsequently, on February 24, 1964, defendant Great American was voluntarily dismissed, without prejudice, in a consent order signed by both parties.

On Tuesday, December 28, 1966, counsel for plaintiff sent a letter to Henry A. Stewart, attorney for Great American, stating as follows:

> "This is to notify you as attorney of record for Great American Insurance Company . . . . that the plaintiff will have no objection to a motion on behalf of Great American Insurance Company to have the dismissal vacated or to intervene in the action and make any defense that might be available at this time. I have discussed this with Mr. D. B. Howe, attorney for the remaining defendant Charles E. Tucker, Sr., and understand that he is also willing for your client to intervene in the action to protect its interests.
>
> "As you know, this case is on the trial calendar as the number one case for trial Monday, January 3rd."

D. B. Howe, attorney for defendant Charles E. Tucker, Sr., talked with Great American's attorney Stewart over the telephone four or five days prior to trial, informing him that defendant Tucker was unavailable and that no defenses were available to be presented.

On Thursday, December 30, 1965, attorney Henry A. Stewart forwarded this letter to the defendant Great American's Atlanta office.

Defendant Great American made no official appearance in court when the case came to trial, on January 3, 1966.

At the trial, it was found that Defendant Charles E. Tucker, Sr. had no defense to present, and that he had absconded and could not be located by his own counsel. Evidence was presented and a verdict and judgment was rendered in favor of the plaintiff against defendant Charles E. Tucker, Sr., individually, and as guardian of Shirley Tucker, in the amount of $70,000. This judgment was unappealed and became final.

Subsequently, on March 8, 1966, Mrs. R. L. Clark, as legal guardian of Shirley Tucker, instituted this suit in the City Court of Polk County, against defendant Great American for judgment in the above case, in the principal amount of $70,000, for $17,500 penalty and for $23,333.33 as attorney's fees. The case was removed to this Court.

In the trial court, the plaintiff contended that having had full notice of the suit against its principal from its beginning, and having received actual notice prior to trial, that it should present any defenses available to it since its principal had no defenses to present, Great American is bound both as to liability and as to the amount of $70,000 represented by the judgment against Tucker, Sr., its assured.

Great American claims that it is not bound by the former judgment, since it was not a party to that suit at the time judgment was rendered; that, if bound as to liability on the bond, it may still litigate the *amount* of its liability in this action; it also contends that the plaintiff is taking inconsistent positions in having the guardianship set aside in one action and then suing on the guardian's bond in the present proceedings.

It being true that the guardianship for which Great American issued its bond was set aside as being void *ab initio*, it is necessary to ascertain the provisions of the Georgia law with respect to such situations.

Georgia Code Annotated, Section 49-225, provides:

> *"Sureties bound through appointment of guardian void.* If the appointment of a guardian for any cause shall be declared void, his sureties shall nevertheless be responsible on the bond for any property which may have been received by him, by virtue or reason of his appointment."

The Georgia courts have held that there are no exceptions to this rule. *Griffin v. Collins,* 123 Ga. 102, 106 (1904) and 125 Ga. 159, 163 (1906).

We first test the claim of the appellant that the judgment against the guardian in the City Court of Polk County, the defendant having absconded, must be paid by the surety on account of its undertaking as surety for Charles E. Tucker, Sr. This obligation is expressed in the condition of the bond as follows:

> "If the above bound Charles E. Tucker, Sr., who has been appointed by the Court of Ordinary of said county, guardian of the person and property of Shirley C. Tucker, shall in all things well and true to perform and discharge the duties of guardian of the said Shirley C. Tucker, as required by law, then this obligation to be void, otherwise to remain in full force and virtue."

The appellant claims that where a court having jurisdiction over the parties, and with notice to the surety, enters a judgment against a guardian, finding him liable for a breach of trust in the discharge of his duties as guardian, such a judgment is binding against a surety both as to the question of liability and as to the amount of the judgment. This appears to be the general rule. It is articulated in the first volume of the Georgia Supreme Court Reports, where in *Brown v. Cheney,* 1 Ga. 410, the Supreme Court quoted with approval the following language from 2 Ohio Reports 347:

> "We take the distinction to be that where the securities have notice of the suit, and may or may not make defense, the judgment against the principal is conclusive against them. Where such notice is not given, the judgment against the principal is prima facie only." 1 Ga. 410, 413.

The many cases cited by the appellee in its brief stating that generally the surety is only prima facie bound by a judgment against its principal are cases in which it is not apparent that notice of the pendency of the action against the principal was brought home to the surety. Such cases are *Bryant v. Owen*, 1 Ga. 355; *Bennett v. Graham*, 71 Ga. 211; *Gibson v. Robinson*, 90 Ga. 756; and *Fidelity and Deposit Co. of Maryland v. Rich*, 122 Ga. 506. The case of *Bryant v. Owen* was typical of these cases. In that case the court said:

> "The surety now before this court *was not a party* to the suit in equity; *he had no notice so far as the record discloses* of its pendency; Of Course *he was not heard* in his own defense in that suit. It is contrary to natural justice and also to all the analogies of the law, that one should be estopped by a decree *to which he was not a party, and of which he had no notice.*" (Emphasis added.)

Here, it is not disputed that the Great American Insurance Company had actual notice of the pendency of the suit having at one time been a party to it, and

having thereafter been notified in writing the two parties to the litigation that no defense would be filed on behalf of the guardian.

The fact, however, that in the ordinary case where a suit is brought against a guardian or other trustee, with notice to the surety, the surety is bound both as to liability and amount of such judgment does not answer the question before us on this appeal. Here, it is without dispute that the guardianship proceedings had been held to be void *ab initio*. In such circumstances, the statute quoted above modifies the general language of the bond itself. In order to give protection to those dealings with an ostensible guardian later held to have been acting without authority, the law says that, notwithstanding this guardianship is absolutely void the surety shall nevertheless be "responsible" for the ". . . property which" was received by Tucker by reason of his appointment.

In passing on the question whether the bonding company was bound to pay the full $70,000 judgment without even any deduction for the $12,012.79, which had actually been turned over to the new guardian, as contended for by appellant, the trial court determined that the only property received by Tucker for which the bonding company would be "responsible" was the cash payment of $35,000 paid in settlement of the ward's claim against the tort feasor in the automobile accident.

The trial court said: "Had this guardianship not been declared void, it would follow that the broadly stated provisions of the bond would render Great American liable for the full judgment against Tucker. However, it is undisputed that the guardianship was declared void, and we must look again to Georgia Code Annotated, Section 49-225 (*supra*). As seen, it provides that the surety 'shall nevertheless be responsible on the bond for any property which may have been received by (the guardian).' Cases directly construing this section are nonexistent. However, it is strongly indicated that the liability, under such circumstances is limited only to the funds received by the guardian prior to the guardianship being declared void."

We conclude that the trial court's construction of the language "any property" is too restrictive, since, it is perfectly clear under Georgia cases, that a cause of action such as held by Shirley Tucker after the injury received by her would be a species of property in the hands of her guardian. Section 85-101, of the Georgia Code Annotated provides: "The term property is used not only to signify things real and personally owned, but to designate the right of ownership and that which is subject to be owned and enjoyed." We see no reason why this broad concept of property should not apply in construing the obligation of a bondsman in a guardianship proceeding. In fact, the language in the case of *Collins*, 125 Ga. 157, seems to indicate as much because it speaks of the duty of an administrator as to "funds *and property*."

(Emphasis added.) See also *Wayne v. Hartridge*, 147 Ga. 127, 132.

Nevertheless, it becomes necessary for us to ascertain on the admitted facts before us, whether the judgment of $70,000 was necessarily based entirely on the failure of the guardian to be "responsible" for such property as was received by him. Here it is plain that as to two species of property, the guardian did respond and thus discharged his obligation to be "responsible" as to such property. These two items were the sum of $12,012.79, which he turned over to the new guardian for his ward, and the claim against the tort feasor Strother and his insurance carrier which was fully reinstated as property of the ward by the adjudication by the proper court that the settlement of that claim by Tucker was void and of no effect. Shirley Tucker, through her new guardian, then had a right to pursue that claim as if nothing had been done as to it. This right was exercised on her behalf and an additional $50,000 settlement was made (by way of the giving and receiving of a covenant not to sue) on account of Shirley Tucker's claims, without any requirement by Strother and Hartford, his insurance carrier, of an accounting for the $12,000 amount and whatever claims Shirley Tucker still had against her husband as her guardian and his bonding company for his defalcations.

Thus, we reach the same mathematical result that was reached by the trial court, but on slightly different grounds.

We find that it was appropriate for the trial court to ascertain how much of the liability included in the $70,000 against Tucker represented a failure by him to "respond" for property which he had received by reason of his appointment as guardian. We think the court properly determined that the amount for which Tucker had failed to "respond" was the sum of $22,-987.21, which he had misapplied, and that he had not failed to "respond" with respect to either the sum of $12,012.79 or the claim against Strother which, by virtue of the state court's action, was still intact after his removal as guardian.

We agree that upon this complicated legal tangle that was presented to the Great American Insurance Company when faced with a demand to pay off the $70,000 judgment and in view of the fact that most of it was not, in fact, due there is no fact presented in these cross motions for summary judgment to warrant submission of this claim for penalty or attorneys fees to the jury.

The judgment is

AFFIRMED.